Citation: *RS v Canada Employment Insurance Commission*, 2023 SST 790

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (499398) dated June 28, 2022 (issued by Service Canada)

Tribunal member:	Glenn Betteridge
Type of hearing:	Teleconference
Hearing date:	February 15, 2023
Hearing participant:	Appellant
Decision date:	March 8, 2023
CORRIGENDUM DATE	**March 17, 2023**
File number:	GE-22-2588

Decision

[1] I am dismissing R. S.'s appeal.

[2] In this appeal the Canada Employment Insurance Commission (Commission) has proven her employer suspended R. S. (the Appellant) from her job for a reason the *Employment Insurance Act* (EI Act) counts as misconduct. In other words, she did something that caused her suspension.[1]

[3] So under the EI Act she isn't entitled to receive benefits during her suspension.[2]

[4] This means the Commission made the correct decision in her EI claim.

Overview

[5] In November 2021 the Appellant was suspended from her job with the Salvation Army (employer). She worked as a sales associate, a public-facing role in a retail store.

[6] The Appellant's employer says it put her on an unpaid leave of absence because she didn't follow its mandatory COVID vaccination policy (vaccination policy).

[7] The Commission accepted the employer's explanation. It decided the Appellant was suspended from her job for a reason the EI Act considers to be misconduct. So the Commission says she wasn't entitled to EI regular benefits during her suspension (November 17, 2021 to April 15, 2022).[3]

[8] The Appellant says she wasn't suspended—her employer put her on a leave of absence. She also says there was no misconduct. She didn't refuse to get vaccinated. She had health issues she and her doctor were investigating. She decided to wait to get answers before deciding if it was safe for her to get vaccinated against COVID.

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[1] In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.
[2] Section 31 of the EI Act says that claimants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.
[3] Her employer lifted its COVID vaccination mandate, and the Appellant went back to work. Under section 31(a) of the EI Act, the Appellant's period of disentitlement ended when her suspension ended. These dates are from the Commission's representations, and the Appellant confirmed them at the hearing. See the Commission's representations at GD4-2.

[9] I have to decide the reason the Appellant got suspended. And whether that reason is misconduct under the EI Act.

Issue

[10] Did the Appellant get suspended from her job for a reason the EI Act says is misconduct?

Analysis

[11] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.[4]

[12] I have to decide two things.

- the reason the Appellant was suspended from her job
- whether the EI Act considers that reason to be misconduct

The reason the Appellant was suspended from her job

[13] I find the Appellant's employer suspended her because she didn't comply with its vaccination policy.

[14] The Commission says the Appellant's leave of absence without pay counts as a suspension under section 31 of the EI Act.[5] This is because her employer put her on leave—she didn't decide to go on leave.

[15] The Appellant says in her reconsideration request and in her appeal she wasn't suspended—she was placed on involuntary unpaid leave of absence. This is what her employer wrote on her record of employment.[6]

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[4] Section 31 of the EI Act says that claimants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.
[5] See GD4-3.
[6] See GD3-15. ~~Here~~ [**Her**] employer used code "N", which means "Leave of absence."

[16] The words used on her record of employment are law and don't dictate how I decide her case. The same goes for the words in her employer's vaccination policy. Her record of employment and the vaccination policy are evidence I have to consider. And I have.

[17] I have to look at the evidence in her appeal through the lens of the EI Act. Under the EI Act an involuntary unpaid leave of absence means the same thing as a "suspension". Looking at it this way, the Appellant disagrees with the word "suspension". But she agrees with the essential facts—her employer told her not to come to work because she wasn't vaccinated, and her employer didn't pay her while she was on leave.

[18] So I find the Appellant and the Commission agree that her employer suspended her (in the EI Act sense of that word) for not complying with its vaccination policy.

[19] I have no reason to doubt what the Appellant and her employer said. And there's no evidence that goes against what they said.

The reason is misconduct under the law

[20] The Appellant's failure to comply with her employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[21] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the legal issues I have to look at when making my decision.

[22] The Commission has to prove it is more likely than not she was suspended from her job for misconduct under the EI Act, and not for another reason.[7]

[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[23] I have to focus on what the Appellant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.[8] I can't consider whether the employer's policy is reasonable, or whether a suspension was a reasonable penalty.[9]

[24] The Appellant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide her conduct is misconduct.[10] To be misconduct, her conduct has to be wilful, meaning conscious, deliberate, or intentional.[11] And misconduct also includes conduct that is so reckless that it is almost wilful.[12]

[25] There's misconduct if the Appellant knew or should have known her conduct could get in the way of carrying out her duties toward her employer and knew or should have known there was a real possibility of being suspended because of that.[13]

[26] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[14] I can't decide whether an appellant was constructively or wrongfully dismissed under employment law. I can't interpret a collective agreement or decide whether an employer breached a collective agreement.[15] I can't decide whether an employer discriminated against an appellant or should have accommodated them under human rights law.[16] And I can't decide whether an employer breached an appellant's privacy or other rights in the employment context, or otherwise.

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[8] This is what sections 30 and 31 of the EI Act say.
[9] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Attorney General of Canada v Secours*, A-352-94.
[11] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] See *McKay-Eden v His Majesty the Queen*, A-402-96.
[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where an appellant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

What the Appellant and the Commission say

[27] The Commission and the Appellant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Appellant's conduct is misconduct under the EI Act.

[28] At the hearing I asked the Appellant if her employer had given her a copy of its vaccination policy. She testified that her employer had. And that she knew there was a real possibility that her employer would put her on leave of absence if she didn't comply with the policy.

[29] She also testified that she was having some worrying health issues at the time of the deadline to get vaccinated and give her employer ~~poof~~ [**proof**]. She described periods where she would feel dizzy and unstable, with a high heart rate and pulse. Her doctor suggested that she do some medical tests to try to find out what was causing these symptoms. She told her employer about this.

[30] She testified that she decided to wait and see what was going on with her health before deciding whether to get vaccinated. So she didn't get vaccinated by the deadline.

[31] Finally, she testified that she didn't apply for a medical exemption from her employer's vaccination policy. She figured her doctor would know better whether she needed an exemption.

[32] The Appellant argues that in these circumstances she didn't refuse to get vaccinated. She was willing to take all reasonable steps—short of getting vaccinated—to follow her employer's policy, including take all COVID safety measures. She was willing to regularly test for COVID—her partially vaccinated co-workers were allowed to continue working after the vaccination deadline if they did COVID testing. She was willing to meet with her employer's health and safety experts to discuss her situation. And she completed her employer's COVID vaccination e-learning module.

[33] The Appellant also argues her employer's policy and actions were unreasonable for her retail job. Other employers in the retail and food and beverage sector in Ontario didn't have mandates.

[34] The Commission says that there was misconduct under the EI Act because the evidence shows:[17]

- her employer adopted a vaccination policy on September 13, 2021[18]
- under the vaccination policy the Appellant had to give proof of vaccination, or get an exemption from her employer, by the deadline (November 15, 2021)
- she told the Commission she received the vaccination policy and knew what she had to do under the policy
- she also told the Commission she knew her employer could suspend her under the policy if she didn't give proof of vaccination (or get an exemption) by the deadline
- she didn't apply for an exemption
- she made a conscious and deliberate personal choice to not get vaccinated by the deadline—because she was worried the COVID vaccine might harm her given her undiagnosed health issues
- and her employer placed her on an unpaid leave of absence (in other words, suspended her) suspended her because she didn't comply with its vaccination policy

[17] See the Commission's Representations at GD4. The Commission makes specific references to the evidence it is relying on, which is in the Commission's reconsideration file (the GD3 document).
[18] The employer sent the Commission a copy of the policy, included in the Commission reconsideration file at GD3-30 to 33. Section 6 of the vaccination policy sets out the "policy requirements". Section 7 is about "policy compliance".

The Commission has proven misconduct under the EI Act

[35] The evidence in this appeal is consistent and straightforward. I believe and accept the Appellant's evidence and the Commission's evidence for the following reasons.

[36] I have no reason to doubt the Appellant's evidence (what she said to the Commission and at the hearing, and what she wrote in her reconsideration request and appeal notice). Her evidence is consistent. She said the same thing to the Commission and the Tribunal. And her story stayed the same from her first call with the Commission through the hearing.

[37] The Appellant and her employer told the Commission essentially the same thing. And there's no evidence that contradicts what she said.

[38] I accept the Commission's evidence because it's consistent with the Appellant's evidence. And there's no evidence that contradicts it.

[39] Based on the evidence I have accepted, I find that the Commission has proven the Appellant's conduct was misconduct because it has shown the Appellant:

- knew about the vaccination policy
- knew about her duty to get fully vaccinated and give proof (or get an exemption) by the deadline
- knew that her employer could suspend her if she didn't get vaccinated
- consciously, deliberately, and intentionally made the personal decision to not get vaccinated and give her employer proof by the deadline was suspended from her job because she didn't comply with the vaccination policy

Addressing the Appellant's other arguments

AL v CEIC

[40] At the hearing the Appellant argued I should follow *AL v CEIC*, a decision of our Tribunal. She said the facts in that case are similar to her case—the appellant also had health reasons why she could not get the COVID vaccine.

[41] In *AL v CEIC*, AL worked in hospital administration. The hospital suspended and later dismissed her because she didn't comply with its mandatory COVID-19 vaccination policy. Based on the evidence and argument in that case, the Tribunal member found that AL did not lose her job for a reason the EI Act considers misconduct, for two reasons:

- First, the collective agreement didn't include COVID-19 vaccination when it was signed, and the employer had not bargained with the union to include one. The Tribunal member reasoned that the employer could unilaterally impose a new term of employment on an employee only "where legislation demands a specific action by an employer and compliance by an employee." And he found that there was no such legislation in the case. This meant that the employer's mandatory vaccination policy was not an express or implied condition of AL's employment. So AL's refusal to get vaccinated was not misconduct.

- Second, AL had a "right to bodily integrity". It was her right to choose whether to accept medical treatment—in this case, the COVID-19 vaccine. If her choice went against her employer's policy and led to her dismissal, exercising that right can't be a wrongful act or undesirable conduct worthy of punishment or disqualification under the EI Act. In other words, her refusal to get vaccinated was legally justified so it can't be misconduct under the EI Act.

[42] I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them persuasive and helpful.[19]

[43] I am not going to follow *AL v CEIC.* With the respect owed to my colleague who decided *AL v CEIC*, I am not persuaded by his findings and the reasoning he relied on to arrive at those findings. In my opinion, his decision goes against the rules the Federal Court has set out in its decisions about misconduct.[20] Our Tribunal does not have the legal authority (in law we call this "jurisdiction") to do two things the Member did in his decision:

- First, he should not have interpreted and applied the collective agreement to find the employer had no authority to mandate that employees get vaccinated against COVID-19.[21]

- Second, he should not have found that the appellant had a right—in the employment context—to refuse to comply with the employer's vaccination policy based on the law of informed consent to medical treatment.[22] In other words, he had no legal authority to add to the collective agreement an absolute right for a

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[19] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I have to follow Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.
[20] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where an appellant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't.
[21] Our Tribunal members' legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting and apply a collective agreement. The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. For example, where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement.
[22] In other words, when deciding whether there was misconduct, he focused on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. He should have focused on the conduct of the claimant. Once again, if the Appellant (and her union) believes that workers had a right to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process was the proper legal avenue to make this argument.

worker to choose to ignore the employer's vaccination policy based on a rule imported from a distinct area of law.

[44] My reasons for not following *AL v CEIC* flow from our Tribunal's jurisdiction. My reasons aren't based on the specific facts of that appeal *versus* the Appellant's appeal. So my reasons aren't limited to the circumstances and arguments the appellant made in *AL v CEIC*.[23] As I understand the Federal Court cases, when I am deciding whether an appellant's conduct is misconduct, I don't have the legal authority to interpret and apply an employment contract, privacy laws, human rights laws, international law, the Criminal Code, or other laws.

The Appellant's other arguments

[45] A recent Federal Court decision says that in COVID vaccine misconduct cases under the EI Act:[24]

- The Tribunal has "and important, but narrow and specific role to play in the legal system", which is to determine why an appellant was dismissed from their employment, and whether that reason is "misconduct".
- The Tribunal doesn't have the mandate or jurisdiction to assess or rule on the merits, legitimacy, or legality of government directives and policies aimed at addressing the COVID pandemic.
- It is reasonable for the Tribunal to not address these arguments, and courts will not interfere with Tribunal decisions on this basis.

[23] The Federal Court decisions I have cited also make practical and institutional sense. It doesn't make sense for our Tribunal to interpret and apply long and complicated collective agreements (or other laws) to decide issues under the EI Act. Labour law (like privacy law, human rights law, and criminal law) is a specialized area of law. We don't have the expertise or the resources to interpret and apply a collective agreement, an employment contract, or other laws. When we limit our role to interpreting and applying the EI Act, this allows our Tribunal to "conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit". (This is what section 3(1)(a) of the Social Security Tribunal Regulation says our Tribunal should do.) Ultimately, this benefits the people who file appeals with our Tribunal. It also avoids situations where our Tribunal decides a collective agreement says one thing, and a labour arbitrator decides it says something else.

[24] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 (*Cecchetto*), at paragraphs 46 through 49.

[46] So, based on the Federal Court's reasons in *Cecchetto*, I am not going to consider the Appellant's argument that her conduct isn't misconduct because her employer's vaccination policy and conduct were unreasonable and inflexible. The fact other employers in the retail and food/beverage sector didn't have vaccination mandates is also not legally relevant or something I need to consider.

[47] There is no question that the financial consequences of the Commission's disqualification decision are harsh for the Appellant. And the COVID pandemic, combined with her health issues, made her life and her working life extremely stressful. Unfortunately for the Appellant, I have to follow the EI Act when I make my decision.[25] I have no power outside the EI Act to make my decision based on principles of fairness or equity.

[48] The EI Act is an insurance plan. Like other insurance plans, someone who makes a claim for a benefit needs to show that they meet all the conditions required to get that benefit.[26] Unfortunately for Appellant, section 31 of the EI Act disentitles her from getting EI regular benefits during her suspension.

Conclusion

[49] The Commission has proven that the Appellant was suspended from her job for a reason the EI Act considers to be misconduct.

[50] So under the EI Act the Appellant isn't entitled to receive EI benefits during her suspension (November 17, 2021 to April 15, 2022).

[51] This means the Commission made the correct decision in her EI claim.

[52] So I have to dismiss her appeal.

Glenn Betteridge

Member, General Division – Employment Insurance Section

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[25] See *Canada (Attorney General) v Knee* 2011 FCA 301
[26] See *Pannu v. Canada (Attorney General)* 2004 FCA 90